

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHESHONIE A. WILLIAMS,

Defendant-Appellant.

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UNPUBLISHED

April 29, 2003

No. 238124

Wayne Circuit Court

LC No. 01-000518

Before: Markey, P.J., and White and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to do great bodily harm, MCL 750.84, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to one to ten years' imprisonment for the assault with intent to do great bodily harm conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

**I. Facts and Procedure**

On December 15, 2002, Albert Howard was home drinking with his nephew, Willie Gendraw, and his brother-in-law, Jeffrey Scott. Howard, Gendraw, and Scott went outside to Howard's van. Defendant, who shared a flat with Howard, was on the porch holding a semi-automatic rifle. Howard told Gendraw to ignore defendant.

While Howard, Gendraw, and Scott were standing by the van, they heard a shot and saw defendant holding the semi-automatic rifle. A verbal altercation was initiated by defendant, who then fired two shots from the semi-automatic rifle at Howard's feet. Howard ignored these shots and proceeded to walk toward the house. Defendant handed the semi-automatic rifle to his wife and then hit Howard on the back of the head, knocking him down. Howard's wife ran upstairs to call 911 as soon as defendant hit Howard. Gendraw and Scott both started to move toward the porch to help Howard, but retreated when defendant retrieved his semi-automatic rifle from his wife. Defendant then fired either three or four shots at Howard, two of which hit him in the stomach.

**II. Analysis**

**A. Self-Defense**

Defendant argues that the trial court reversibly erred by denying his request that the jury be instructed on self-defense and defense of others. We disagree. Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court. *People v Heikkwen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). Jury instructions in a criminal case must address each element of the offense charged, as well as defenses and theories of the parties that are supported by the evidence. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002); *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975). If an applicable instruction was not given, the appellant bears the burden of establishing that “the trial court’s failure to give the requested instruction resulted in a miscarriage of justice.” MCL 769.26; *Riddle, supra* at 124. A conviction will not be reversed unless it affirmatively appears more probable than not that the error was determinative of the outcome of the case. *Id.* at 125.

A person is acting in justifiable self-defense

if, under all the circumstances, he honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force. The necessity element of self-defense normally requires that the actor try to avoid the use of deadly force if he can safely and reasonably do so, for example by applying nondeadly force or by utilizing an obvious and safe avenue of retreat.

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However, (1) one who is without fault is never obligated to retreat from a sudden violent attack or to retreat when to do so would be unsafe, and in such circumstances, the presence of an avenue of retreat cannot be a factor in determining necessity; (2) our law imposes an affirmative “duty to retreat” only upon one who is at fault in voluntarily participating in mutual non-deadly combat; and (3) the “castle doctrine” permits one who is within his dwelling to exercise deadly force even if an avenue of safe retreat is available, as long as it is otherwise reasonably necessary to exercise deadly force. [*Riddle, supra* at 119, 142.]

In the present case, there was no evidence to support defendant’s claim that he honestly and reasonably believed that he was in imminent danger of death or great bodily harm. Gendraw and Scott testified that they approached defendant only after he struck Howard, and retreated as soon as defendant retrieved his semi-automatic rifle. There was no evidence that Howard, Gendraw, or Scott had any weapons. Furthermore, there was no evidence that either Howard, Gendraw, or Scott threatened defendant, that defendant honestly and reasonably believed that he was in danger of serious bodily harm or death, or that defendant’s action of shooting Howard appeared at the time to be immediately necessary. Officer Jeremy Moreland testified that defendant stated, “I called the police, I shot the man[,] but it was an accident. I just wanted to scare him. I didn’t mean to shoot him.” From this statement, it appears that defendant’s only justification for shooting Howard was that it was an accident. The evidence presented at trial does not support the conclusion that defendant was justified in shooting Howard in self-defense.

There was no evidence that any threat defendant allegedly perceived from Howard, Gendraw or Scott was either immediate, sudden, fierce, or of a violent nature, thus justifying the use of deadly force. Therefore, we conclude that no error occurred in refusing to instruct the jury on self-defense and defense of others.

#### B. Lesser Included Offense Instruction

Next, defendant argues that the trial court reversibly erred in denying his request that the jury be instructed on the lesser offense of reckless discharge of a firearm. We disagree. The resolution of this issue is controlled by *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002). *Cornell* discusses the application of MCL 768.32(1), which provides, in pertinent part:

Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

Defendant was charged with assault with intent to commit murder, MCL 750.83. “The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *People v McRunels*, 237 Mich App 168, 181, 603 NW2d 95 (1999). Defendant requested that the jury be instructed on reckless discharge of a firearm, MCL 752.861, which provides: “Any person who, because of carelessness, recklessness or negligence, but not willfully or wantonly, shall cause or allow any firearm under his immediate control, to be discharged so as to kill or injure another person, shall be guilty of a misdemeanor . . . .”

A requested instruction on a necessarily included lesser offense, whether a felony or a misdemeanor, is proper if the charged greater offense requires the jury to find a disputed factual element which is not part of the lesser included offense, and a rational view of the evidence would support it. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002); *Cornell, supra* at 357. However, MCL 768.32(1) does not permit instructions on cognate lesser offenses. *Reese, supra* at 446; *Cornell, supra* at 359. A cognate lesser offense is one which shares some common elements with, and is of the same class as, the greater offense, but also has elements not found in the greater offense. *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999).

Reckless discharge of a firearm is a cognate lesser offense of assault with intent to commit murder. *People v Flinnon*, 78 Mich App 380, 390; 260 NW2d 106 (1977). Therefore, an instruction on reckless discharge of a firearm in this case would be precluded under MCL 768.32(1). *Cornell, supra* at 359. Thus, the trial court did not err in refusing to give the reckless discharge of a firearm instruction to the jury.

#### C. Motion to Disqualify Trial Judge

Finally, defendant argues that the trial court committed structural constitutional error in refusing to refer defendant’s motion for disqualification of the trial judge to the chief judge upon request. If a challenged judge denies a motion for disqualification, upon request of a party, the

motion must be referred to the chief judge for a decision de novo. MCR 2.003(C)(3)(a); *In re Contempt of Steingold*, 244 Mich App 153, 160; 624 NW2d 504 (2000). If the challenged judge is the only judge in the court, or is the chief judge, the motion must be referred to another judge as designated by the state court administrator. MCR 2.003(C)(3)(b).

Defendant moved for disqualification of the trial judge on the first day set for trial. Defense counsel argued that defendant had a very strong belief that the trial judge was personally biased against him because she had changed his bond without a bond hearing, denied his request for a decrease in bond, and referred to him during another proceeding as a “menace to society.” The trial judge denied defendant’s request for disqualification because she had no independent recollection of any personal bias toward defendant and because no affidavit was filed supporting the motion, as required by MCR 2.003. Defense counsel, pursuant to MCR 2.003(C)(3)(a), then requested to go before the chief judge to argue the motion. The trial court denied the request and added that the fourteen-day notice required for this motion had also not been met.

Under MCR 2.003(C)(3)(a), a trial judge is required to refer a disqualification motion to the chief judge if requested. “The requirement that the motion be referred to the chief judge is not discretionary.” *Steingold, supra* at 160. However, in *People v Bettistea*, 173 Mich App 106, 123; 434 NW2d 138 (1988), this Court held that a motion to disqualify that was both untimely and not accompanied by any affidavits was procedurally defective and thus failed to preserve the disqualification issue for appellate review. In the present case, defendant’s attorney not only filed the motion late, which under MCR 2.003(C)(1) is considered a factor in deciding whether the motion should be granted, but also failed to include an affidavit, which is clearly required by MCR 2.003(C)(2). Thus, pursuant to *Battistea, supra* at 123, we conclude that defendant has failed to preserve the issue of disqualification for review by this Court.<sup>1</sup>

### III. Conclusion

The jury’s conviction of defendant for assault with intent to do great bodily harm, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227(b), is affirmed. The trial court’s decision not to instruct the jury with respect to self defense, defense of others and the lesser cognate offence of reckless discharge of a firearm was proper. Defendant’s procedurally defective motion to disqualify the trial judge was not preserved for appellate review.

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<sup>1</sup> We further observe that defendant made absolutely no showing of improper bias by the trial judge. Defendant woefully failed to overcome the presumption of judicial impartiality. Furthermore, even if the trial judge’s refusal to refer this motion to the chief judge is deemed to have been error, it was harmless. This Court has held that any error attributed to a failure to refer a motion for disqualification to the chief judge is harmless when the motion for disqualification was properly denied to begin with. *Coones, supra* at 727.

Affirmed.

/s/ Jane E. Markey  
/s/ Helene N. White  
/s/ Brian K. Zahra